

**STATE OF MICHIGAN  
IN THE SUPREME COURT**  
[ Appeal From Cheboygan County Circuit Court, Honorable Scott L. Pavlich]

**JAMES LITTLE and CHERYL LITTLE**, Husband and Wife; **STEVEN RAMSBY; MARY KAVANAUGH;** and **STANLEY W. THOMAS and NANCY G. THOMAS**, Husband and Wife; **MICHAEL McCLUSKY** and **GLADYS McCLUSKY**, Husband and Wife, and **ANN SKOGLUND**,

Plaintiffs/Counter-Defendants/Appellees  
**SUPREME COURT APPELLANTS**

-vs-

Lower Court  
File No: 98-6480-CH

Honorable Scott L.  
Pavlich

**BETTY H. HIRSCHMAN; GERALD W. CARRIER** and **SALLY ANN CARRIER**, Husband and Wife; **FRANCIS J. VanANTWERP and ELIZABETH VanANTWERP**, Husband and Wife, **JOHN P. VIAU** and **GENEVIEVE GUENTHER VIAU**, Husband and Wife; and **MASON F. SHOUDER and JEAN ANN SHOUDER**, Husband and Wife,

Defendants,

and

Court of Appeals  
Docket #227751

**SUPREME COURT  
DOCKET #121836**

**BETTY H. HIRSCHMAN; GERALD W. CARRIER** and **SALLY ANN CARRIER**, Husband and Wife; **JOHP P. VIAU and GENEVIEVE GUENTHER VIAU**, Husband and Wife,

Defendants/Counter-Plaintiffs,

and

**BETTY H. HIRSCHMAN**,

Defendant/Counter-Plaintiff/Appellant/  
**SUPREME COURT APPELLEE**

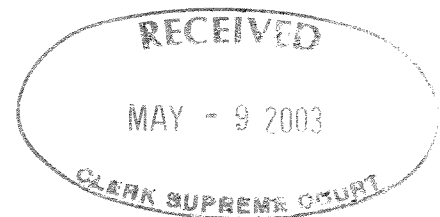
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**BRIEF ON APPEAL - APPELLANTS**

**ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF BASIS OF JURISDICTION**

This Court has jurisdiction over this appeal pursuant to MCR 7.301 (A) (2) and MCR 7.302. Plaintiffs/Appellants filed a timely Application for Leave to Appeal on June 24, 2002.

## **STATEMENT OF QUESTIONS INVOLVED**

1. **SHOULD THIS COURT AFFIRM THE 1913 PLAT'S DEDICATION OF THE PARKS TO THE OWNERS OF THE SEVERAL LOTS; REVERSE THE COURT OF APPEALS' DECISION; AND REINSTATE THE TRIAL COURT'S OPINION?**

**The Trial Court would, presumably, answer "YES"  
The Court of Appeals would answer "NO".**

**Plaintiffs/Appellants answer "YES"  
Defendant/Appellee answers "NO"**

2. **IF THIS COURT AFFIRMS, AS LEGAL, THIS PRIVATE PARK DEDICATION, SHOULD THE TRIAL COURT'S DETERMINATION OF THE SCOPE OF PERMITTED USE OF LAKESIDE PARK, RIVERSIDE PARK AND THE ALLEY BETWEEN LOTS 47 AND 48 BE AFFIRMED ON THE RECORD?**

**The Trial Court would, presumably, answer "YES"  
The Court of Appeals did not address this issue but would presumably answer "YES".**

**Plaintiffs/Appellants answer "YES"  
Defendant/Appellee answers "No"**

## STATEMENT OF FACTS

[Parenthetical page numbers refer to accompanying APPENDIX page numbers.]

Plaintiffs' lawsuit sought equitable Court relief reaffirming their rights as back lot owners to continue to use various alleys and parks within the Plat of Ye-Qua-Ga-Mak (hereinafter the "Plat"), as they had been exercising those rights of use, without objections, for decades. Defendants, also lot owners within the Plat, sought Court relief by the filing of their Counter-Claim to preclude Plaintiffs, and other back lot owners within the Plat, from continued use of those alleys and parks.

In 1913, the Plat of Ye-Ga-Qua-Mak was recorded in Cheboygan County, Michigan. It is a plat of land that borders the Cheboygan River to the east and Mullett Lake to the south. Plaintiffs and Defendants introduced copies of the Plat at Trial as Exhibits #1, A-1 and B. A reduced copy is set out in the Appendix. (175a).

The Plat contains streets and alleys which were:

**"dedicated to the use of the public".**

The Plat also contains two parks: Lakeside Park (which abuts Mullett Lake) and Riverside Park (which abuts the Cheboygan River), (collectively referred to in this Brief as "the Parks").

The Plat states that the Parks are:

**"dedicated to the owners of the several lots"**

within the Plat. The alleys access the Parks from the streets. (175a)

Plaintiffs/Appellants are owners of lots adjacent to Riverside Park, within the Plat, and are back-lot owners as to Lakeside Park. (16a, 17a, 28a) All original Defendants are owners of lots adjacent to Lakeside Park. There are only 43 or 44 homes in the Plat. (202a) Defendant/Appellee, Betty Hirschman, is the current owner of Lots #46 and #47 within the Plat (hereinafter referred to as "Hirschman's property"). Hirschman's property borders Riverside Park to the east, Lakeside Park to the south, and an alley which provides access to Lakeside Park to the west (hereinafter referred to as "the alley"). (17a, 28a)

In 1998, the original Defendants here obtained a Judgment against the Cheboygan County Road Commission vacating the rights of the public to use several of the alleyways within the subdivision/Plat, which alleys provided back-lot owners access to Lakeside Park, including, specifically, the alley adjacent to, and to the west of, the Hirschman property, between Lots #47 & #48 (30a - 31a) The alley accessing Lakeside Park immediately west of the Hirschman property was then blocked and barricaded. (20a, 32a, 33a).

On October 5, 1998, Plaintiffs filed a Complaint in the Cheboygan County Circuit Court against all of the original Defendants seeking equitable Court relief to stop Defendants from continued blockage of access to Lakeside Park through the alley located between Lots #47 & #48. (14a - 34a)

On October 30, 1998, the original Defendants filed an Answer and Counter-Claim asserting that Plaintiffs now had no right of access to Lakeside Park through the vacated alleys, and further asserting that the dedication of Lakeside Park and

Riverside Park to the various lot owners failed because of the grantor's alleged "revocation". (35a - 50a)

On or about November 10, 1998, Plaintiffs filed a First Amended Complaint and Answer to Counter-Claim, generally asserting that:

1. the Plat dedication of the Parks to the various lot owners was valid and had not failed because of any alleged "revocation";
2. that the Plaintiffs, and their invited guests, had the right of use of the Parks, pursuant to the 1913 recorded Plat dedication;
3. that the Plaintiffs had a right of use based upon the decades-long use of Lakeside Park by the Plaintiffs, fully and actively joined in -- and not objected to -- by the Defendants, since at least the 1960's; and
4. that the Plaintiffs, as lot owners, had a continued, on-going right of access to the Parks through the vacated alleys.

All of Plaintiffs' claims were grounded upon various legal theories, including the Plat dedication, "adverse possession", "acquiescence", "laches", "estoppel" and "statute of limitations". (51a - 73a)

A Preliminary Injunction was issued on November 17, 1998, permitting Plaintiffs the right of continued use of the alleys, and specifically, the alley between Lots #47 & #48 for purposes of access to Lakeside Park. (74a - 76a)

On February 25, 1999, Plaintiffs filed a Motion for Partial Summary Disposition and supporting Brief asserting a right, as lot owners, to the continued use of the alley to access the beach area of Lakeside Park (in the manner that had

occurred for decades) based, in part, upon Nelson v Roscommon Cty Road Comm, 117 Mich App 125; 323 NW 2d 621 (1982). Plaintiffs further asserted that the private Park dedications had not been revoked for the reason that Deeds had been issued prior to any act which may have been considered an "act of revocation". Feldman v Monroe Twp Board, 51 Mich App 752; 216 NW 2d 628 (1974) (77a - 84a )

The Trial Court, on April 1, 1999, granted Partial Summary Disposition in favor of Plaintiffs with respect to Counts I and IV of their First Amended Complaint and against Defendants, and in favor of Plaintiffs, dismissing the entire Counter-Claim (Counts I and II), thereby permitting the Plaintiff lot owners to continue their decades-long use of the beach area of Lakeside Park via alley access (between Lots #47 and #48) and further terminating Defendants' claim that the dedication of the private Parks to the lot owners had been revoked. (85a - 87a )

As permitted by the Court Order of April 1, 1999, (85a-87a), Defendants filed a First Amended Counter-Claim and then a Second Amended Counter-Claim on May 24, 1999, specifically asserting, in Count I thereof, that to be effective private park dedications require acceptance and alleging that the dedication of the Parks to the various lot owners, as contained within the 1913 Plat should fail for "non-acceptance" by the lot owners. (88a - 96a )

Paragraphs 7,10 & 12, and the "prayer for relief" contained in Count I, of Defendants' Second Amended Counter-Claim, stated:

"7. That the clear intent of the plat is to create two (2) waterside private parks for the use of the various lot-owners of the subdivision.

\*\*\*\*

10. Like a public park, a private park is not formed until there is both a dedication and an acceptance by the lot-owners who benefit by use of the private park.

\*\*\*\*

12. That the original plattors of said subdivision withdrew their offer to dedicate upon the non-acceptance of the back lot owners or for other reasons unknown, by their deeding of said property between the exterior lot owners of the plat and the waters of Mullett Lake and the Cheboygan River so as to forever preclude the ability of the back lot owners to accept a dedication that was open for acceptance from 1913 to 1922.

\*\*\*\*

WHEREFORE, the Counter-Claim Plaintiffs pray:

A. That this Court make a determination that title to the property between the exterior lots of the subdivision and the waters of Mullett Lake belong to said lot owners not only by express grant but by the failure to accept the dedication by the back lot owners from its original date of dedication being the year 1913."

(90a - 92a)

Count II of the Second Amended Counter-Claim sought equitable relief and repayment of taxes, as well as asserting the requirement of a "Park Manager. (92a - 95a)

Plaintiffs' second Motion for Summary Disposition was granted, in part, and denied in part, by the Court's Order entered September 16, 1999. (97a - 99a) Those portions of the Defendants' Second Amended Counter-Claim, which asserted a "revocation" of, and/or failure of, "acceptance" of the private dedication of the Parks to the lot owners were dismissed (for the second time on the "revocation" issued).

Also dismissed were Counter-Defendants' tax claims and Park Manager claim. The Trial Court's Order of September 16, 1999, preserved for trial the ownership issue and:

"the issue relating to the extent of use provided and/or permitted in Lakeside Park and Riverside Park in the Plat of Ye-Ga-Qua-Mak".  
(99a)

A separate, unrelated issue concerning the fee ownership rights in the alleyway between the Hirschman property (Lots #46 & #47) and the Kavanaugh property (Lot #45), had been pled. That issue was tried, ruled on in favor of Betty Hirschman (219a - 220a) , and has not been appealed.

A two-day trial was held on September 16<sup>th</sup> and 17<sup>th</sup>, 1999. The witnesses testified to the Parks' and alleyways' usage for decades. The testimony was largely overlapping. The beach area of Lakeside Park at the juncture of Mullett Lake and Cheboygan River, adjacent to and south of Lots #46 & #47, and south of the alley immediately west of said lots had been used for bonfires in a fire pit since 1966 and for swimming, sunbathing, picnicking, parties and boat cleaning since at least the 1940's. (103a, 104a, 106a, 108a, 110a, 111a, 112a, 115a, 116a, 122a, 123a, 124a, 126a, 127a, 129a, 132a, 135a, 139a, 140a, 141a, 144a, 145a, 147a, 148a, 150a, 154a, 156a, 158a, 160a, 165a, 167a, 173a, 182a, 189a, 191a, 196a-199a, 200a, 203a, 205a-209a) Plaintiff, Jim Little's, father built a picnic table and bench for this beach area, which was used by lot owners until the bench was destroyed. (144a, 145a) As

shown on Defendants' Exhibit K (aerial photo), the fire pit was moved from its historic location, to the present location, about five years ago. (182a, 315a)

This use of the beach area of Lakeside Park was known by all of the parties, and participated in by the parties, and their invited guests, without objection until the filing of this lawsuit. (104a, 112a, 116a-118a, 121a, 124a, 139a, 140a, 148a, 197a-199a, 210a) Betty Hirschman actively participated in the use of the beach area of Lakeside Park and , and did not object to those uses for decades. (110a, 126a, 207a, 208a)

Defendant, Betty Hirschman, and her late husband, have owned Lots #46 and # 47 since 1965. (178a) In fact, Defendant Hirschman, took an active role in organizing games on the beach with children of the various lot owners and continually reminded the children how lucky they were to live in the kind of community where this kind of beach use was permissible. (208a) These uses were also never objected to over the years by Ms. Burtine Bullock, Betty Hirschman's predecessor in title to the Hirschman property. (198a)

The alleyway between Lots #47 & #48 has been used by vehicles for decades to provide access to the beach area of Lakeside Park for Plaintiffs and their guests. (125a, 135a, 143a, 152a, 201a)

Fishing, pedestrian walking and dog walking has occurred by lot owners and their guests for decades across the length of both Lakeside Park and Riverside Park. (108a, 137a, 138a, 140a, 203a)

The clean-up of the beach occurred co-operatively with expenses shared for years. (136a)

Defendant, Betty Hirschman testified that her concerns or problems began during the last five (5) years. (250a) She retired five years ago and is there six months a year. (270a) Those concerns involved an increase in people coming to the beach area of the Park in boats (180a, 181a) dog debris (183a) and litter and soiled diapers. (184a) Her son, William Hirschman, also so testified. (105a) Betty Hirschman further testified that the beach area was previously policed until approximately 5 years ago. (185a)

To the contrary, Co-Plaintiff, Gerald Carrier, thought there has not been much activity in the last ten years in the beach area of Lakeside Park. (168a)

The social activities on the beach area of Lakeside Park in front of Lots #46 & #47 occurred, to Betty Hirschman's knowledge, from 1952 forward (186a). Her family and children participated with other families and their children in the bonfires and use of the beach area of Lakeside Park. (188a) Betty Hirschman was aware of Defendant Carrier's parties. (195a) Dogs used the beaches over the years (190a) Betty Hirschman acknowledged destroying the bench donated by Jim Little's father. (193a, 194a)

There were numerous pictures of the beach area of Lakeside Park introduced, including an aerial photo, Defendants' Exhibit K, and the Trial Court personally viewed the property. (211a) In its Opinion and Order dated February 25, 2000 (213a-

221a), the Trial Court stated, as its findings of fact on the use of the beach on

Lakeside Park:

"The testimony and proofs established that there are only two sandy beach areas on the plat. Those are the public access area to the far westerly end of the plat as well as the sandy beach area located in front of Defendant, Betty Hirschman's summer home on Lots 46 & 47. This beach in front of the Hirschman residence is part of the area designated on the plat as the lakeside park and has been regularly used by lot owners in the plat for sunbathing, swimming, picnicking and other beach related activities for as long as the parties can remember and dating back at least to the 1940s. This beach was accessed by an alley between Lots 47 & 48. There has been a table and bench located on the beach side of this alley since approximately 1980 and used by the various lot owners to picnic, relax and store their towels while swimming. There was also an area for a campfire to the east of this alley way on the beach again located in that general area for a period in excess of 20 years prior to litigation."

(214a, 215a)

The Trial Court further found:

". . .As previously noted, the lakeside area that borders Lots 46 and 47 is unique in that it contains the only sandy beach area that has historically been used by the lot owners. The Plaintiffs have property rights in this area designated as the lakeside park due to the fact that they are lot owners in the plat. Traditionally and historically, the lakeside park adjoining Ms. Hirschman's property has been used as a common beach area for swimming, sunbathing, picnicking, etc. The parties, through this traditional and historical use, have defined the scope and definition of the lakeside park.

\*\*\*\*\*

Defendants' point is also well taken in that even though this area is designated a lakeside park, it does not result in unrestricted free rein for the various lot owners to use this area for whatever purpose they see fit. It certainly was not the intent of the parties drafting this plat that these park areas could be used for all night parties, motor vehicles or camping. Since the plat is silent on the hours of use, it is inferred that they intended that the park areas be used during reasonable hours. It appears on this record that it would be reasonable that the park areas not be used by parties other than the adjoining lot owners pas the hour of 10:00 p.m. Furthermore, Plaintiffs' complaint regarding jet skis is well taken. It certainly was not contemplated by the drafters of the plat in 1913 that these waterside parks would be an area to use and [sic] beach motorized jet

skis and the like. This use was inconsistent with the drafters and the historical use made of the property and therefore, this Court finds that the Plaintiffs may use the lakeside park beach area that has traditionally been used for swimming, sunbathing, picnicking, and other like activities; however, it may not be used to accommodate motorized vehicles on the beach or use of personal water craft such as jet skis, etc. for beaching or mooring on the lakeside park. The parties shall also be allowed one fire pit as has been used over the years.”

Cheboygan County Circuit Court Opinion and Order, dated 2/25/00

(217a, 218a)

As to the use of the alleyway located between Lots #47 & #48, the Trial Court found as follows:

“Traditionally and historically, the alley between Lots 47 and 48 has been treated differently than the other alleys in the plat due to the fact that it accesses the only sandy beach area commonly used by the various lot owners. These lot owners have used the alley in such a fashion as to have rights to continue to use that alley either under the plat or by way of adverse possession. The use of this alley by motor vehicles has been open, visible and notorious for a period well in excess of 15 years. Under either of these two theories, the Plaintiffs are entitled to the use of this alley either by foot or motor vehicles but their use must not block or make the use of the alley inaccessible by the other parties.”

Cheboygan County Circuit Court Opinion and Order, dated 2/25/00

(217a)

The Trial Court’s Opinion and Order was memorialized in a Final Judgment and Permanent Injunction, dated March 21, 2000 (223a-225a) . The Trial Court Order denying Defendants’ Motion for Rehearing and Reconsideration was entered on May 18, 2000 (226a-228a).

The only Defendant who appealed the Trial Court’s findings was Defendant, Betty H. Hirschman.

On appeal, Betty Hirschman, argued generally:

1. "Under Michigan law, however, there is no such thing as a 'private dedication'." (231a);
2. that the scope of use determined by the Trial Court was in error:
  - a. "The Court erred in declaring that the Plaintiffs may use vehicles in the Hirschman alley. . . (229a)
  - b. "The court imposed this clearly unfair servitude on Hirschman's beach based in part on its clearly erroneous finding that only two sandy beaches exist in the plat. . . " (232a); and
3. that the use of the parks:

"impinge on her use and enjoyment of her property so as to amount to a nuisance"  
(233a)

Plaintiffs responded generally that:

1. the issue of the alleged "failure at law of a private dedication" was improper as a new issue not raised at trial and, if raised, it would have failed as a matter of law;
2. that Defendants' alleged nuisance argument was improper as a new issue raised on appeal, but that the full record fully supports the Trial Court Ruling on the continued use of the Lakeside Park beach as used for decades;
3. that the findings of the Trial Court were fully supported by the record;
4. that the scope of use of the alleyway between Lots #47 & #48 was fully supported by the record;

5. that the scope of use of the Parks was fully supported by the record;  
and

6. that the Trial Court's findings are supported at law. (236a-238a)

The Court of Appeals, in its Opinion issued April 19, 2002 (239a-244a) held that the private dedication failed at law, based upon *Martin v Redmond*, 248 Mich App 59; 638 NW 2d, 142 (2001) an Opinion issued after the Trial Court's Opinion and after Briefs had been filed on appeal in this matter. This case was referred back to the Trial Court without review of the other issues.

Plaintiffs' Motion for Rehearing was denied by the Court of Appeals on June 5, 2002. (245a) Plaintiffs' filed their Application for Leave to Appeal to this Court on June 24, 2002; , which Application was granted on March 25, 2003.

## ARGUMENT

### I.

**THIS COURT SHOULD AFFIRM THE 1913 PLAT'S DEDICATION OF THE PARKS TO THE OWNERS OF THE SEVERAL LOTS; REVERSE THE COURT OF APPEALS' DECISION; AND REINSTATE THE TRIAL COURT'S OPINION.**

#### A. Standard of Review

In equity cases, the appellate court reviews the record *de novo*, with due deference being given to the findings of the Trial Court. The Trial Court's findings will be sustained unless the appellate court's ruling would have been contrary to that

of the Trial Court. Marconeri v Village of Mancelona, 124 Mich App 286; 335 NW 2d 21 (1983). Trial Court findings, if not clearly erroneous, must be affirmed. Theis v Howland, 424 Mich 282, 293, 294; separate opinion 300, 301; 380 NW 2d 463 (2002) If the Trial Court's findings of fact are not clearly erroneous, then the appellate court reviews the record *de novo* to determine whether the equitable relief granted was appropriate in light of those facts. Attorney General v John A. Biewer Co., Inc., 140 Mich App 1, 12, 13; 363 NW 2d 712 (1985).

Further, whether private Dedications are illegal in the State of Michigan is a question of law. Questions of law are subject to *de novo* review by this Court.

Terrien v Zwit, 467 Mich 56, 61; 648 NW 2d 602 (2002)

**B. This Court's and the Court of Appeals' Decisions make it clear that a Plat's dedication of private parks to lot owners is legal.**

The Court of Appeals in this case held this 1913 dedication of the parks to the various lot owners to be illegal based upon Martin v Redmond, supra.

Until the Court of Appeals' Opinion here, the decades-long reliance upon the 1913 Plat dedication to the various lot owners by Appellants and their predecessors in title in acquiring their property and using the beach area of Lakeside Park had not been misplaced.

The essence of the Court of Appeals' ruling here came from Martin v Redman, supra, quoting from Kraushaar v Bunny Run Realty Co., 298 Mich 233,

241-242; 298 NW 514 (1941), wherein that Court, citing from AM JUR, stated:

“There is no such thing as a dedication between the owner and individuals. The public must be a party to every dedication.”

ID, p 241

However, a separate body of Supreme Court and Court of Appeals’ Opinions, grounded in facts and Plat dedications substantively similar to the facts and dedication in this case, fully support the conclusion that such dedications are, and this dedication is, lawful.

In Shurtz v Westcott, 286 Mich 692; 282 NW 870 (1938), this Court dealt with the following factual scenario concerning an 1891 Plat.

“In the plat there are 112 lots and two parcels marked ‘north park’ and ‘south park’. The ‘parks’ are separate by a street or highway known as Forest avenue, and are the part of the plat closest to the lake. The ‘parks’ on their eastern boundary along the lake shore are approximately 400 feet in length, 48 feet wide at the south end and 154 feet wide at the north end. The streets in the plat were dedicated to the public, but the ‘parks’ were not so dedicated.”

ID, p 693 [Emphasis Supplied]

This Court, in Shurtz, supra., cited from Westveer v Ainsworth, 279 Mich 580, 583; 273 NW 275 (1937):

“It is the great weight of authority that dedication by the owner-plattor becomes irrevocable upon sale of lots by reference to the plat and he is estopped to vacate it.”

ID, P 696

This Court further specifically stated as follows:

“As to the ‘parks’ the Trial Court held that any lot owner has the right to the use of the ‘parks’ in common with other lot owners. In our opinion the trial court was right in so decreeing. The record sustains a finding that when lots were sold in the plat, the sale was made in reference to the use to be made of the parks by the lot owners. Moreover, there was no objection to the use of the

parks on the part of lot owners and the public generally until shortly before appellant Schurtz filed her bill of complaint. The making and recording of the plat, the sale of lots, the use of the streets and parks by the lot owners for a great many years estops appellant Schurtz from now claiming exclusive rights in the parks and streets. The parks as shown on the plat contained in the record indicate no severance or reservation of the water front. The lake is shown as adjoining the parks. It must therefore necessarily follow that the water front is a part of the street and parks and as such the rights of appellant Schurtz to the water front are co-extensive only with other lot owners.”

ID, p 697 [Emphasis Supplied]

Thus, in 1938, this Court unequivocally affirmed lot owners’ rights to use parks arising from a private dedication , both because such lots were purchased in reliance upon the dedication and because of “*estoppel*” in that for many years the parks’ use was not objected to. As set forth subsequently herein the record in this case fully supports reinstatement of the original Trial Court’s Opinion on both grounds (i.e, lot purchase in reliance upon the private dedication; and *Estoppel*.)

Schurtz v Wescott, supra., was followed by Kirchen v Remenga, 291 Mich 94; 288 NW. 344 (1939). In that case, this Court dealt with an 1866 Plat described as follows:

“On this plat there appeared 150 lots designated by number, the remainder of the land being designated as parks, walks, streets, etc. The Plat was laid out so as to make each lot adjacent to one of the parks. Lots were sold and deeded with reference to the Plat. Each lot purchaser became a stockholder in the corporation. Summer homes were built on many of the lots.”

ID, p 100

This Court further stated:

“The sale of lots with reference to a plat in which areas are designated as parks passes to the purchasers of the lots a common right to use such areas for park purposes. *Schurtz v Wescott*, 286 Mich 691.”

ID, p 104

These cases were followed by the Court of Appeals' in Feldman v Monroe  
Twp Board, supra. That case considered a 1928 plat that had a dedication which read:

“ ‘...the streets, parks and canals as shown on plat are hereby dedicated to the use of the property owners only’.”

ID, p 753 [Emphasis Supplied]

As the Feldman, supra, Court stated:

“A private dedication is ‘irrevocable’ upon the sale of lots by reference to the plat and the grantees of the dedicators are bound by the dedication. SEE: 86 ALR 2D 860 § 6, P 877; *Westveer v Ainsworth*, 279 Mich 580, 273 NW 275 (1937); *Kirchen v Remenga*, 291 Mich 94; 288 NW 344 (1939).”

ID, p 754

That Opinion then cited from Kirchen, supra., at pages 108-109, affirming the enforceability of private dedications:

“And the rule has been established in this state that such an easement appurtenant to the lots sold is valid and enforceable not only against the platfor of such land, but as against all who hold under the original grantor. *Westveer v Ainsworth*, 279 Mich 580 [273 NW 275 (1937)]; *Schurtz v Wescott*, 286 Mich 691 [282 NW 870 (1938)]; 18 CJ 115.”

ID, pp 754-755 [Emphasis Supplied]

Then, as the Court succinctly stated:

“For a case involving similar facts and supporting this position, see *Schurtz v Westcott*, 286 Mich 691; 282 NW 870 (1938).”

ID, p 755

Similarly, the Court of Appeals in Fry v Kaiser, 60 Mich App 574, 577; 232 NW 2d 673 (1975) dealt with a plat that said:

“ . . .the channels as shown on the said plat are hereby dedicated to the use of the lot owners” [emphasis supplied by Court].

There the Court stated:

“Where a plat is recorded the purchasers receive not only the interest as described in their deed, but also whatever rights as are indicated in the plat.”  
ID, p 577

Similar facts exist in this case as well. Plaintiffs/Appellants acquired their lots with the understanding from their respective predecessors in title, and/or from the Plat itself, that, as lot owners, they had a right to use the Parks, in general, and the beach area of Lakeside Park south of Lot #46 & #47 in particular, as the testimony showed and as the Trial Court found, it has been used for decades. (113a, 114a, 124a, 131a, 146a, 149a, 150a, 153a, 155a, 157a, 158a) This right of use, and the exercise of that right of use, of the beach area of Lakeside Park by Plaintiffs was understood by Defendants. (117a, 130a, 166a, 198a, 210a) The decades-long use was not objected to by any of the Defendants, nor by Betty Hirschman’s predecessor, Bertine Bullock. (114a, 130a, 166a, 199a, 210a) Appellee Hirschman and her family actively participated with other lot owners and their families in the use of the beach area of Lakeside Park (103a, 110a, 126a, 204a, 207a, 208a)

The record further makes it clear that Defendants’ purpose in filing their original action (seeking abandonment of the alley) against the Cheboygan County Road Commission was to preclude back lot owners access to, and use of, the Parks, which access and use by back lot owners had occurred for decades. (169a-172a)

Defendant, Gerald Carrier testified:

"Q: And it was your intent to preclude access to the parks through the alleys by the lot owners?

A: Correct."

\*\*\*\*\*

"Q: . . .I'm asking, were you trying to make sure the parks were close[d] to the lot owners? Did you understand that was what you were trying to do?

A: Yes."

(172a, 174a)

John P. Viau testified:

"Q: You heard the testimony about various lot owners driving to that alley between Hirschman and Carriers for these past few decades. You heard that testimony?

A: Yes.

Q: And it was your intent in filing that abandonment petition to preclude that use?

A: Driving to the alleys?

Q: Yes.

A: Yes. I didn't want anyone driving down on those alleys. Some of the alleys you can't drive down them anyway."

\*\*\*\*\*

Q: . . . What did you think the Plat permitted that you wanted the Court to change?

A: Well any of the back lot owners could come down there and use our beaches anytime they wished.

Q: And you were hoping that would be changed?

A: Right.

Q: So you were attempting to affect the back lot owners rights, as you perceived them?

A: Right."

(162a - 164a)

This calculated effort to take away back lot owners' continued use of the beach area of Lakeside Park and of the Parks in the manner used for decades was undertaken even though the record is clear that there was never objection voiced by any

Defendant to the use of Lakeside Park, in general, and the beach area in front of Lots #46 & #47 in particular. (117a, 150a, 199a, 210a) Appellee/Betty Hirschman, took part in the social activities with other lot owners and their families in the beach area of Lakeside Park from 1952 forward. (186a)

This long-standing Park use by Plaintiffs/Appellants is consistent with statute.

This 1913 Plat was prepared pursuant to 1887 PA 309 (246a-248a), which required, prior to recording, that the Auditor General of the State:

“ . . . shall approve same whenever such plat shall conform in his opinion to the requirements of this act.”

(247a)

1887 PA 309 further provided that the recorded plat is *prima facie* evidence of the making and recording of such map or plat:

“ . . . in conformity with the provisions of this act.”

(248a)

The use of the Parks by Appellants and their reliance upon the Plat dedication is consistent with the specific statutory “*prima facie*” presumption of legality, based upon State Auditor General approval. Under that statute as written and under this long-standing line of precedent, the dedication of the Parks to the various lot owners in this plat is lawful. The Trial Court’s Opinion should be reinstated, in its entirety.

Appellee believes it is proper to ignore the Schurtz, supra., body of law, citing in her Brief in Opposition to Application for Leave to Appeal Atwood v Mayor and Common Council of Sault St. Marie, 141 Mich 295, 296-297; 104 NW 649 (1905) for the proposition that a point of law implied in a prior decision but not considered

expressly does not constitute binding precedent. It is very difficult to see how she concludes that this Court's prior express consideration of private dedications in several cases is only an implication. The applicable standard was stated by this Court in

*Detroit v Michigan Public Utilities Comm'r* 288 Mich 267; 286 NW 368 (1939):

“When a court of last resort intentionally takes up, discusses and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision.”

ID, p 299-300 [Emphasis Supplied]

Or, as stated by this Court in *Boyd v W. G. Wade Shows*, 443 Mich 515; 505 NW 2d 544 (1993):

“As the Court of appeals repeatedly noted, it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete and until this court takes such action, the Court of appeals and all lower courts are bound by that authority.”

ID, p 523 [Emphasis Supplied]

Plaintiffs/Appellants acknowledge the apparent contrary Opinion of this Court in *Kraushaar v Bunny Run Realty Co.*, supra., cited by the Court of Appeals' Opinion in *Martin v Redmond*, supra. There is a conflict in authority - on the face of it. However, in *Kraushaar*, supra., there is a complex factual setting, examined, in detail, by Amicus Michigan Association of Realtors that is quite dissimilar to that here existing. There, this Court affirmed Plaintiff's rights of use to the facilities of the Bunny Run Country Club. Rights were not taken away. In addition, this Court did, in part, rewrite the Plat dedication of roads, in part, to help achieve an equitable result. The Court of Appeals Opinion here achieved an inequitable result. It takes away long held and long used back lot owner rights in the Parks.

In Martin v Redmond, supra., the Court of Appeals' panel dealt with deeds prior to the recording of the Plat there at issue. Just the opposite was the case here; deeds were in reference to the Plat. Martin, supra., involves application of specific statutory language, incorrectly, of the current Land Division Act, **MCL 560.253 (1); MSA 16.430 (253) (1)** to an out lot not a park. As applicable to this case, however, that Court stated:

“However, a thorough review of the case law convinces us that, before and after the platting and subdivision statutes were enacted, “dedication” clearly referred to an appropriation of land for *public use*. *Attorney General ex rel Dep't of Natural Resources v Cheboygan Co Bd of Co Rd Comm'rs* 217 Mich App 83, 88; 550 NW 2d 821 (1996); see also *Patrick v Young Men's Christian Ass'n of Kalamazoo*, 120 Mich 185, 191; 79 NW 208 (1899).”  
ID, p 65

Those cases do not support that conclusion.

**Attorney General Ex Rel Department of Natural Resources v Cheboygan  
Cty Board of Cty Road Commissioners**, 217 Mich App 83, 89; 550 NW2d 821  
(1996), the Court of Appeals dealt with conflicting claims in dedication between two public bodies:

“We find that the doctrine of dedication and acceptance is simply inapplicable as between two governmental entities concerning jurisdiction over a road.”  
ID, p 89

In Patrick v Young Men's Christian Association of Kalamazoo, 120 Mich 185, 191; 79 NW 208 (1899), this Court determined that land dedication for a church, *albeit* use that is a sense “public”, is not public ground in the ordinary sense.

The Court of Appeals was bound by the authority of Schurtz v Westcott, supra., and its progeny. The analysis in those Opinions is equally applicable here.

C. The intent of the drafters of Plats and Deeds is the Michigan standard for determination of the limits of private dedications.

Determination and enforcement of plattor's intent, requiring an affirmation of private dedications in old plats is the standard set out by this Court in 1985 in Thies v Howland, 424 Mich 282; 380 NW 2d 463 (1985) wherein this Court dealt with a notation on the plat which stated:

"... 'that the Driveways, Walks and Alleys shown on said plat are hereby dedicated to the joint use of all the owners of the plat.' "

ID, p 286 [Emphasis Supplied]

The primary issue regarding that 1907 plat involved a 12-foot wide "walk" running immediately along the lakeshore. This Court dealt with the challenge that the back lot owners had no right of use because the private rights granted by dedication were "riparian" rights, which could not be severed, and were, therefore, illegal. This Court set aside that technical illegality; the plattors' intent was the relevant standard for affirming the dedication of private rights. This Court stated:

"Since defendants' lots do not touch the shore of Gun Lake, their land is not riparian.

\*\*\*\*\*

Even if we conclude that defendants merely have an easement interest in the walk and alleys, they may still prevail. Plaintiffs cannot prevent defendants from erecting a dock or permanently anchoring their boats if these activities are within the scope of the plat's dedication. McCardel v Smolen, 404 Mich 89, 97, 103; 273 NW2d 3 (1978), and do not unreasonably interfere with plaintiff's

use and enjoyment of their property. The ownership of the walk and alleys and the scope of the dedication of these lands are interrelated, but distinct inquiries.

ID, p 288, 289 [Emphasis Supplied]

This Court there defined the relevant inquiry to be the plattor's intent, both in terms of the interest conveyed and the right of use conveyed, even though the actual grant of "riparian rights" to back lot owners was unlawful.

As to the legal interest conveyed, this Court stated:

"The trial court found that the walk was merely an easement and that plaintiffs owned the fee in that portion of the walk that ran in front of their lots. This finding is not clearly erroneous. The phrase 'joint use' standing alone does not ordinarily denote the passing of a fee interest in land."

ID, p 293

As to the scope of use, the Trial Court's finding was affirmed, except for dock construction. That finding stated:

" 'It is apparent to this Court that the original plattors as well as the former owners intended that the 'back-lot' owners would have the use of Gun Lake. The Court does not disturb these rights which the Court concludes means boating, fishing, sunbathing, and all other uses commensurate with the use of lakes such as Gun Lake.' "

ID, pp 294, 295

Herein the testimony of use and the Trial Court's finding of use is commensurate with the uses of lakes such as Mullett Lake. In Dobie v Morrison, 227 Mich App 536, 541, 542; 575 NW 2d 817 (1998), the Court of Appeals dealt with a 1966 Plat involving a challenge to the use of the "riparian" rights of use to the private "park". The park was dedicated to:

"... "the use of the owners of lots in this plat which have no lake frontage'."

ID, p 537

The Court in Dobie, supra., followed this Court's analysis in Thies, supra.:

"The intent of the plattors should be determined with reference to the language used in connection with the facts and circumstances existing at the time of the grant. Thies, supra at 293. The dedication provided that the park was dedicated to 'the use of the owners of the lots in this plats which have no lake frontage.' (*emphasis supplied*), but did not explicitly purport to transfer ownership of the park from plaintiff's predecessors, the Fedewas, to all the back lot owners. We find the language used to be more consistent with the grant of an easement rather than a grant of fee ownership rights."

ID, p 540

The Court further determined that:

"The second issue is whether the trial court improperly determined the scope of defendant's easement. In its opinion, the trial court stated that the back lot owners, essentially defendants in this case, could use the park as they had done 'traditionally and historically'. The trial court stated more specifically that the permissible uses included, but were not limited to picnicking, swimming, fishing, sun bathing, constructing one dock with specific limits regarding its size and other features, walking, using a 'pit fire' and using and keeping a picnic table."

ID, p 541 [Emphasis Supplied]

The facts here are substantially similar to those in Dobie, supra. The intent of the plattors was well understood by Defendant/Appellee. Paragraph 7 of the Second Amended Counter-Claim states:

"7. That the clear intent of the plat is to create two (2) waterside private parks for the use of the various lot-owners of the subdivision.

The long line of cases from this Court and the Court of Appeals requires affirmation of the clearly-understood platlor intent.

The appropriate analysis for this case, and for Martin v Redmond, supra., is set forth in Little vKin, 249 Mich App 502, 511, 512; 644 NW 2d 621 (2002). There, after lengthy analysis, the Court of Appeals followed Thies, supra. for the proposition

that riparian rights normally exclusive held by riparian landowners are transferrable, by easement, concluding that the plattor's intent is the controlling inquiry.

Then, after examining numerous appellate Opinions after Theis, supra., the Court stated:

"Implicit in the decisions from our state courts is the important principle that, where possible, courts should honor the intent and established relationships of the parties by refraining from rewriting their original easement agreements, on which many residents of our state have relied for years without compliant or controversy. Furthermore, giving effect to the clear expression of the grantor in drafting easements for the benefit of lot purchasers appropriately honors the expectations of the parties. this is particularly evident in this case, in which defendants paid significant premiums for lots based, in part, on easements purporting to grant a large lakefront area with broad accompanying usage rights.

By giving effect to the easements as written and to the intention of the original grantors, as required by *Thompson*, *Thies*, and *Dobie*, our ruling honors the reasonable expectations of lot purchasers. Moreover, to hold otherwise would call into question the scope of rights currently enjoyed by lakefront easement holders throughout this state."

ID, p 515, 516

This support for plattor intent, contract rights and clear expectations, was, in part, Judge Levin's reasoning in granting leave stated in Jacobs v Lyon Twp., 444 Mich 914, 918; 512 NW 2d 834 (1994):

"Much of the value of the back lots undoubtedly hinged on providing their owners with easy and meaningful access to the lake."

ID, p 922

Thus, prior case law set out three analytical approaches:

- ▶ If the challenge was to private park "dedications", Schurtz, supra., and its successors found the dedication legal.

- ▶ If the challenge was to the private park “dedication”, Krauschaar, supra, and its successors said the dedication failed.
- ▶ If the challenge was to the private park grant of “riparian rights”, the plattor intent controlled, pursuant to Theis, supra and its successors.

The plattor’s intent analysis in Theis, supra, and the analysis in Schurtz supra., affirming back lot owners’ contract rights and clear expectations from private dedications in their lot purchases are substantively consistent with and supportive of the statutory presumption of legality required by 1887 PA 309. (246a-248a) Furthermore, this Court’s holding in Krauschaar, supra., did, in fact, protect those Plaintiffs’ contract rights and expectations, in affirming Plaintiffs’ rights of use to the Bunny Run Country Club facilities, even to the point of effectively rewriting a portion of that Plat dedication language to achieve that result. Thus, Krauschaar, supra, supports the proposition that an equitable analysis of the total situation is required, in affirming long-held contract rights and clear expectations. That is the result of the approach taken by this Court in Thies, supra. in looking at plattor intent. That is the result obtained by affirming the private dedications on old plats for reasons of reliance and estoppel, set forth in Shurtz, supra.

Finding “illegal” a park dedication approved by the State Auditor General, pursuant to 1887 PA 309 and relied upon for ninety (90) years is not equitable, is contrary to existing precedent, and:

“... call[s] into question the scope of rights currently enjoyed by lakefront easement holders throughout the state.”

Little, supra, p 516

All three lines of precedent require reinstatement of the Trial Court's Opinion and Order affirming Plaintiffs/appellants/back lot owners' long-held and long-used rights in the parks, validating the legislative legality of the Plat, approved by the State Auditor General.

**D. In accepting for consideration the issue of the scope of a private dedication for the very first time "on appeal" the Court of Appeals created a legal error in not also applying those legal and equitable defenses requiring an affirmation of the Trial Court's Opinion.**

Plaintiffs/Appellants understand that this Court did not commit its time and energy to accept this case and Martin v Redmond, supra., if it did not intend to review and decide issues involving private dedications in plats, hopefully setting forth legal principles applicable to private dedications generally within the State. If private dedications are found "illegal", however, the Trial Court's Opinion should, nonetheless, be reinstated for the reasons set forth subsequently.

In Adams v Cleveland-Cliffs Iron, Co., 237 Mich App 51, 57; 602 NW 2d 215 (1999) The Court of Appeals stated as to its examination of its "new" issue:

"Nonetheless, in the interests of justice, and because the issue concerns a question of law and all the facts necessary for its resolution have been presented, we will examine the related doctrines of trespass and nuisance and will determine how they bear on the intrusions at issue in this case."

ID., p 57

Similarly here, even if private dedications are "illegal", the undisputed facts contained in this record require affirmation of Plaintiffs/Appellants' rights of use as set out in the Trial Court Opinion. As detailed in the Statement of Facts and Argument I B, all of the Plaintiffs/Appellants acquired their respective back lots in reliance upon

Plat language and upon representations of their right of use of the beach on Lakeside Park and the parks in general in the manner testified to. The Plaintiffs/Appellants' (and other back lot owners') use of the alleyway west of Lot #47 by automobile to access the Lakeside Park beach and the use of the Parks has been on-going since at least the 1940's (decades-long use/acquiescence). The record is undisputed. The findings are not clearly erroneous and were not challenged on appeal. Further, those facts fully support an equitable finding, as this Court found, in Schurtz, supra., that Defendants, including Appellee Hirshman, were *estopped* by their decades-long joint participation, and lack of objection/acquiescence, in Plaintiffs/Appellants' use of the Lakeside Park beach and the Parks and alleys as found by the Trial Court. The record here is unambiguous, as was found in Schurtz, supra., that Plaintiffs acquired their lots in reliance upon the rights of use established by dedication of the Parks to the various lot owners and they were legally entitled to that reliance. 1887 PA 309. (246a - 248a)

Defendant's only challenge to Plaintiffs/Appellants' right of use, pursuant to the Park dedications, was based upon "revocation" and "failure of acceptance", similarly dismissed by the Trial Court. The Trial Court Opinion, framed in the context of those pleadings, its rulings and the proofs presented, properly stated:

“(T)he plaintiffs have property rights in th(e) area designated as the Lakeside Park due to the fact that they are lot owners in the plat.”  
(218a)

That statement was based upon Defendant/Appellee Hirschman's pleadings and the Trial Court's prior grants of Summary Disposition.

As previously noted, Appellee, Betty Hirschman, has owned her lots since 1965 and, as undisputed in the Trial Transcript, fully participated in the Lakeside Park beach activities, without objection, for decades.

“*Equitable estoppel*” arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts which are relied upon and acted upon and which will be prejudicial. *Hoye v Westfield Ins. Co.*, 194 Mich App 696, 705; 487 NW 2d 838 (1992). The doctrine of “estoppel” applies to real estate. *Colonial Theatrical Enterprises v Sage*, 255 Mich 160; 169; 237 NW 529 (1931). Defendants’ actions over the decades estop their claims here.

The doctrine of “*laches*” requires:

“The passage of time combined with the changing condition that would make it inequitable to enforce the claim against the defendants.”  
*Troy v Papadelis*, (on remand) 226 Mich App 90; 572 NW 2d 246 (1997) pp 96, & 97.

The Trial Testimony makes it clear that both elements fully exist in this case to preclude, under the doctrine of “*laches*”, the assertion of the illegality of the private dedication, by Appellee Hirschman.

Appellee’s undisputed ownership of Lots #46 & #47 since 1965 clearly would have barred her claim of failure of private park dedication under the “statute of limitations” based upon **MCL 600.5801; MSA 27A.5801** and **MCL 600.5815; MSA 27A.5815** had she pled it at the Trial Court level.

The Court of Appeals also should have affirmed the Trial Court Opinion under the doctrine of “*judicial estoppel*”. As the Court of Appeals stated in *Living*

*Alternative for Developmentally Disabled, Inc. v Dept. of Mental Health*, 207 Mich

App 482, 525 NW 2d 466 (1994):

“A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.”

ID, p 484

As this Court more fully delineated in *Paschke v Retool Industries*, 445 Mich 502; 519 NW 2d 441 (1994):

“ . . . the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party’s position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent.”

ID, p 510

Those elements are clearly present here. The positions are totally inconsistent. The Trial Court’s Opinion clearly relied upon the Defendant Hirschman’s Circuit Court pleading alleging that a private dedication functions the same as a public dedication. Defendant Hirschman took the exact opposite position as a “new issue” in the Court of Appeals. For this reason also, the Trial Court opinion should be reinstated.

Accordingly, should this Court determine that this private dedication on this 1913 recorded Plat is illegal, this Court should, for reasons of “reliance”, *laches*, *equitable estoppel*, *judicial estoppel* and the statute of limitations, fully reinstate, and affirm in its entirety, the Opinion and Order of the Trial Court, dated February 25, 2000.

## II.

**IF THE SUPREME COURT REVERSES AND/OR VACATES THE COURT OF APPEALS' OPINION, THE TRIAL COURT'S DETERMINATION OF THE SCOPE OF PERMITTED USE OF LAKESIDE PARK, RIVERSIDE PARK AND THE ALLEY BETWEEN LOTS 47 AND 48 IS FULLY SUPPORTED BY LAW AND THE RECORD, AND THE TRIAL COURT'S OPINION AND ORDER SHOULD BE AFFIRMED, IN ITS ENTIRETY.**

### A. Standard of Review.

In equity cases, the appellate court reviews the record *de novo*, with due deference being given to the findings of the Trial Court. The Trial Court's findings will be sustained unless the appellate court's ruling would have been contrary to that of the Trial Court. Marconeri v Village of Mancelona, supra. Trial Court findings, if not clearly erroneous, must be affirmed. Theis, supra. If the Trial Court's findings of fact are not clearly erroneous, then the appellate court reviews the record *de novo* to determine whether the equitable relief granted was appropriate in light of those facts. Attorney General v John A. Biewer Co., Inc., supra.

### B. The Trial Court's determination that vehicular use of the alley between Lot 47 and Lot 48 may continue, is fully supported by the law and the facts on the record presented and should be affirmed.

The applicable law was set forth by the Trial Court in its Opinion of February 25, 2000:

"An alley is defined in Black's Law Dictionary, Revised fourth Edition, to be 'a narrow way designed for the special accommodation of the property it reaches'. The rights of an easement holder 'must be

measured and defined by the purpose and character of the easement'. Unverzagt v Miller, 306 Mich 260, 265 (1943); Theis v Howland, 424 Mich 282, 297 (1985).

If the wording of a grant is uncertain or ambiguous, circumstances surrounding the grant and the situation of the parties must be inquired into which the view at arriving at the intention of the parties. Harvey v Crane, 85 Mich 316, 322 (1891). It has also been held that the court looks to the parties' conduct and use of the easement for the past if the easement historically as evidence of the parties intent and understanding regarding the easement holders rights under the easement. Cantienny v Friebe, 341 Mich 143, 147 (1954)."

Trial Court's Opinion of 2/25/00, pp 4, 5  
(216a, 217a)

The Trial Court, stated in its Opinion, following a full bench trial and listening and observing all witnesses and conducting a site tour of the Plat:

"Traditionally and historically, the alley between Lots 47 and 48 has been treated differently than the other alleys in the plat due to the fact that it accesses the only sandy beach area commonly used by the various lot owners. These lot owners have used the alley in such a fashion as to have rights to continue to use that alley either under the plat or by way of adverse possession. the use of this alley by motor vehicles has been open, visible and notorious for a period well in excess of 15 years. Under either of these two theories, the Plaintiffs are entitled to the use of this alley either by foot or motor vehicles but their use must not block or make the use of the alley inaccessible by the other parties." [Emphasis Supplied]

Trial Court's Opinion, dated 2/25/00, p 5  
(217a)

The Appellee's argument to the Court of Appeals was that:

"... there was no evidence that by dedicating a plat with narrow 12-foot wide alleys the plattors intended any alley for the use of automobiles. Nor was there any evidence that the plattors, in any case, intended that only Appellant's alley would be used for automobiles."

(Pages 17, 18 of Appellee's Appeal Brief)

Appellee's only argument is without merit. Alleys have been used by automobiles since there have been automobiles. further, there has been no challenge to the conclusion of law of the Trial Court that vehicular use of the alley between Lots #47 & #48 is also supported by the doctrine of "*adverse possession*". The Trial Court's findings should be affirmed. They are not clearly erroneous.

In addition, the record fully supports a finding that Betty Hirschman, who has owned her land since 1965, never objected to use of the alleyway for decades. As set forth previously herein, she should be *estopped* from raising this argument now. She, too, is guilty of "*laches*". For these reasons also, this Court should affirm the Trial Court's Opinion dated February 25, 2000, as to the use of the alley between Lots #47 & #48.

C. **The Trial Court's holding and determination on the use of Lakeside Park and Riverside Park is fully supported by the record and should be affirmed in its entirety.**

As set forth in detail previously herein, the record fully supports the findings as set forth by the Court in its February 25, 2000 Opinion.

"Count IV of Plaintiffs' complaint requests that all Plaintiffs have the right to use the lakeside part and riverside park. Again, the language in the plat designates these areas as a lakeside and a riverside park, however, nothing more is said. Land along the water's edge which has been designated to contain these parks varies substantially in its makeup and terrain. As previously noted, the lakeside area that borders Lots 46 and 47 is unique in that it contains the only sandy beach area that has historically been used by the lot owners. The Plaintiffs have property rights in this area designated as the lakeside park due to the fact that they are lot owners in the plat. Traditionally and historically, the lakeside park adjoining Ms. Hirschman's property has been used as a common beach area for swimming, sunbathing, picnicking, etc. The

parties, through this traditional and historical use, have defined the scope and definition of the lakeside park.”  
(217a, 218a)

The Trial Court also stated in its February 25, 2000, Opinion:

“The parties shall also be allowed one fire pit as has been used over the years.”  
(219a)

The Court personally viewed the premises (211a), saw all the pictures and the video and heard all the testimony, and properly concluded:

“Land along the water’s edge which has been designed to contain these parks varies substantially in its makeup and terrain”.  
(217a)

The park and alley uses affirmed by the Trial Court are those uses which have existed for decades and are consistent with the general understanding and use of “parks”, and are consistent with the sales advertisement for the Plat. (212a). The uses affirmed by the Trial Court, participated in by Appellants, Appellee and other property owners, their families and invited guests, are proper under the doctrines of “*adverse possession*”, “*acquiescence*”, “*estoppel*” and “*laches*” and the statute of limitations. Appellee, Hirschman, who has owned her property from and after 1965, fully participated in the use of the beach area of Lakeside Park for decades without objection or complaint to that use by the back lot owners. The use has been decades long and has been acquiesced in. The findings of the Trial Court are consistent with the original platlor’s intent and, in fact, are uses traditional for a park on such a lake. The Court’s findings are not clearly erroneous.

**D. The Trial Court's determination with regard to the uses and limitations of Lakeside Park – as fully supported in the record – is not intrusive and should be sustained.**

Appellee did not raise the “nuisance” argument to the Trial Court and, thus, it is not a basis for overturning the Trial Court’s Opinion. In addition, the Trial Court’s Opinion imposing reasonable limitations on the use of the Park (such as the 10:00 p.m. curfew), constitutes a reasonable exercise of the Court’s “equity power”. Appellee is asserting that traditional park uses, which she participated in for decades, such as picnicking, swimming, fishing, sun bathing, and a fire pit, constitute a “nuisance” and/or are an unreasonable use of the Park.

Such uses are reasonable and enforceable here. They are fully supported by the trial court record. The Trial Court hear all of the testimony, saw all the pictures and personally examined the premises. Appellee, Betty Hirschman’s, “objections” commenced recently. Her decades long participation in the uses found by the Trial Court is not in dispute.

The Trial Court’s findings of fact are fully supported in the record as set forth in detail previously within this Brief. Its rulings are consistent with, and supported by, the case law, both for the reasons set forth by the Trial Court, and as set forth herein.

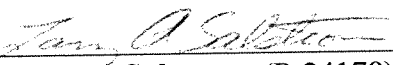
Had this “nuisance” argument been raised at the Trial Court level, it would have failed under the facts of this case, as well as under the “statute of limitations” and the doctrines of “*laches*” and “*estoppel*”, all as previously set forth herein. Appellant, has owned her property from 1965, and, for decades, and has actively participated in,

and did not object to, any of the uses confirmed by the Trial Court. No “nuisance” exists. The Court’s findings are not clearly erroneous.

### RELIEF SOUGHT

Private dedications have been found lawful. Plaintiffs/Appellants’ understandable reliance upon the 90 year old dedication should be protected, preserving plattor intent, and the equitable findings of the Trial Court. For the reasons set forth herein, the Court of Appeals’ Opinion, should be REVERSED, and the Trial Court’s Opinion of February 25, 2000, setting forth the scope of the dedication and the uses permitted in the alleyways and the uses permitted for the beach area of Lakeside Park both Parks, generally, should be AFFIRMED, in its entirety.

Respectfully submitted:  
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BY:   
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